PRODUCTS LIABILITY AND CONSUMER PRODUCT WARRANTY REFORM IN CANADA: THE CONSTITUTIONAL IMPLICATIONS

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PREFACE

This is the third and final volume of a three-volume study of products liability and consumer product warranty reform in Canada. The first yolume studied the products liability - personal injury problem.[1] The second volume dealt with the related but conceptually separate question of consumer product warranty reform.[2] Each of these studies concluded by listing certain proposals for reform, requiring in some cases federal or provincial legislative action. In this volume the constitutional implications of these reform proposals are examined and assessed.

This study proceeds as follows. Part I examines the constitutional implications of reforms proposed in the Products Liability-Personal Injury Study. Part II explores the constitutional implications of the reforms proposed in the Consumer Products Warranty Study. The reform proposals or recommendations for legislative action are presented and discussed in the order in which they appear in the original studies.

Unlike the controversial complexity of the analysis presented in Volumes I and II, the constitutional analysis here is by contrast somewhat tame and to some extent tedious. The fact of the matter is that none of the reforms proposed in either Volumes I or II raise any serious questions of constitutionality. Virtually all of the proposals are directed at provincial legislators and fall easily within traditional provincial jurisdiction over tort and contract. With one or two minor exceptions, provincial jurisdiction to implement the reforms suggested is really beyond dispute. However to reassure both provincial and federal policy-makers that this is so, I have assessed individually the constitutional implications of each of the proposals and have summarized the relevant constitutional jurisprudence for ready reference. Put simply, constitutional capability

will not be a problem.

Because the reforms proposed fall easily within traditional areas of provincial or federal legislative competence, the body of this work is quite short. Nonetheless, the research involved was considerable. I would like to acknowledge with gratitude the excellent work that was done in this regard by my research assistants, Ian McGilp and Richard Steinecke. I would also like to extend my sincere thanks to Linda Day for her secretarial assistance. Any errors or omissions are of course my responsibility alone.

E.P.B.
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I. THE CONSTITUTIONAL IMPLICATIONS OF THE PRODUCTS LIABILITY REFORM PROPOSALS

In the Products Liability Study, entitled Products Liability and Personal Injury Compensation in Canada: Towards Integration and Rationalization, I made the following recommendations:

> "1. Federal and provincial health authorities should give immediate priority to the establishment of a national electronic injury surveillance system such as the NEISS system currently in operation in the U.S.
>
> 2. Provincial legislators should not waste precious legislative time debating strict liability tort reforms.
>
> 3. Instead, policy-makers should seize the opportunity for rational and responsible law reform and begin the task of developing an integrated and comprehensive first-party no-fault accident compensation scheme.
>
> 4. Once the principle of universal accident compensation has been accepted, the requisite secondary research described in Chapter IX should be completed.
>
> 5. It is recommended that policy-makers view the adoption of universal accident compensation as a first-step to the eventual enactment of universal disability insurance."(3)

These five reform proposals can be fairly compressed into three basic recommendations: (1) the establishment of a national electronic injury surveillance system, (2) the enactment of universal first-party no-fault accident compensation for all product-related injuries, and (3) further research re the appropriate role of federal and provincial governments in increased product safety regulation. The constitutional implications of each of these proposals will now be considered.

1. The Establishment of a National Electronic Injury Surveillance System

A. Summary of the Constitutional Implications

Provincial jurisdiction over health care and hospital administration

is clear and comprehensive. Whether by ministerial directive or specific legislation, provincial health authorities could easily work together to establish a national electronic injury surveillance system. The federal role, apart from receiving and acting upon the injury data collected, would mainly be a financial one, i.e. cost sharing. In sum, there are no constitutional difficulties with this proposal.

B. Detailed Analysis

This proposal would have federal and provincial health authorities working together to establish a nation-wide electronically-sophisticated injury data collection system.(4) The NEISS system currently in operation in the U.S. provides a useful analogy. All emergency rooms in major American hospitals are connected to data banks monitored by the Consumer Product Safety Commission. This national tabulation of product-related injuries allows immediate access to injury statistics and results in a more responsive and more rigorous federal-level product safety regulation.

To establish a similar NEISS here in Canada would probably take very little in the way of provincial or federal legislative initiative. In all likelihood, hospital emergency rooms could be outfitted with the necessary technology merely on the administrative direction of the appropriate provincial health ministry. If any legislative mandate is necessary, provincial competence is assured by virtue of section 92(7) of the British North America Act which explicitly confers upon the provincial legislature exclusive jurisdiction over "the establishment, maintenance and management of hospitals . . . ."(5) Probably the only impediment here would be a financial one: federal and provincial officials would have to work out appropriate cost sharing details. Apart from financing, the establishment

of a NEISS in Canada would be relatively easy and immeasurably worthwhile.

2. Provincial Jurisdiction to Enact Universal First-Party No-Fault Accident Compensation

A. Summary of the Constitutional Implications

The traditional provincial jurisdiction over "property and civil rights in the province"(6) and, in particular, over tort and personal injury compensation provides ample constitutional foundation for the enactment and implementation of universal accident compensation. Neither the no-fault aspect nor the government monopoly aspect nor the financial contribution or funding source question would pose any problems, at least not constitutional ones. Both the case law and the secondary literature is unequivocal: a state-run, first-party no-fault accident compensation scheme is clearly within provincial jurisdiction.

B. Detailed Analysis

Provincial jurisdiction under section 92(13) over "property and civil rights" is wide-ranging and comprehensive.(7) The "civil rights" jurisdiction in particular has allowed provincial tort and contract reforms, virtual abolition of the common law tort action for some classes of injury, and the establishment of state-run first-party no-fault compensation programmes. Provincial workmen's compensation legislation and more recently provincial automobile accident no-fault "add-ons"(8) are two important examples of provincial initiatives in this area.

That the provincial legislatures do have the requisite constitutional authority to establish state-run first-party no-fault injury compensation

schemes is clear from the workmen's compensation jurisprudence. In Workmen's Compensation v. C.P.R.[9] the Judicial Committee of the Privy Council, although dealing with a case involving out-of-province injury, made it quite clear that first-party no-fault workmen's compensation legislation was within provincial legislative competence. Viscount Haldane said this:

> "The right conferred . . . is the result of a statutory condition of the contract of employment made with a workmen resident in the province for his personal benefit . . . their Lordships think that it is a legitimate provincial object to secure that every workmen should possess it as a benefit . . . the Act is . . . in substance a scheme for securing a civil right within the province."/(10)

Four years later, in 1924, the Supreme Court of Canada endorsed this decision of the Privy Council and noted that it "settled beyond controversy that . . . the province has jurisdiction to provide for the payment of compensation to workmen injured by industrial accidents."[11]

The constitutional basis for provincial workmen's compensation schemes is the provincial jurisdiction over "civil rights" and not simply its jurisdiction over employment or employment contracts. In Commission du Salaire Minimum v. Bell Telephone,[12] Martland J., writing for the Supreme Court of Canada was careful to stress that workmen's compensation legislation "created new legal rights"[13] that were more properly described as "statutory rights"[14] than simply conditions of employment. The distinction is an important one for our purposes here. Because provincial jurisdiction to enact first-party no-fault accident compensation legislation is not limited to employment contracts or work-place injuries, but includes "civil rights" generally, a universal accident compensation scheme covering work, automobile and home accidents, indeed all product-related personal injury regardless of cause

or locale, would be within provincial legislative competence. The extensive "property and civil rights" jurisdiction of section 92(13) provides provincial legislatures with more than enough constitutional authority to enact universal accident compensation.

There are however two matters that should be addressed in more detail - the government monopoly aspect and the financial contribution question. A state-run personal injury scheme was of course upheld by the Privy Council in the Workmen's Compensation Board decision discussed above. But could a provincial legislature take over personal injury insurance completely and establish a state-run monopoly? The answer seems to be yes.

In Canadian Indemnity v. A.G. B.C.,[15] the Supreme Court of Canada upheld British Columbia legislation that was designed explicitly to takeover the entire automobile insurance business in the Province through "the establishment of a universal, compulsory scheme of motor vehicle insurance . . . with a monopoly . . . for the (government) Corporation."[16] The Court readily acknowledged that "the impact of the legislation upon the appellants' automobile insurance business could not have been more drastic,"[17] but went on to find that the ICBC legislation was clearly within provincial competence. This decision of a unanimous Court confirms beyond doubt that provincially-owned and operated personal injury compensation schemes would not raise any constitutional concern.

Finally, a brief word about the financial contribution question. The three most likely funding sources for a provincially operated universal accident compensation scheme would be (1) employer and product manufacturer levies, (2) user fees such as driver license charges and (3) general government revenues. Dealing with the last point first, the case law is

clear that provincial general revenues can be used to finance accident compensation schemes.[18] As for user-fees, such as driver license charges, the relevant provincial taxing jurisdiction is section 92(2) which allows provincial legislatures to impose "direct taxation . . . in order to the raising of revenues for provincial purposes".[19] The availability of this taxing jurisdiction for accident compensation funding was discussed and approved by the Privy Council in the Workmen's Compensation Board decision noted earlier.[20]

The only area of potential constitutional difficulty re funding is the employer or product manufacturer levy. Because both parties could pass on the charge or tax to employees or consumers via lower wages or higher prices, one might characterize this charge or tax as an "indirect tax" and thus beyond provincial jurisdiction. Fortunately for provincial legislators, the Privy Council made it clear in Workmen's Compensation Board v. C.P.R.[21] that the employer levies were indeed "direct" taxes and thus fell within provincial jurisdiction.[22] The characterization of the levies as "direct taxes" was affirmed by the Supreme Court of Canada in 1936 in a litigation involving the Nova Scotia Workmen's Compensation scheme.[23] Given these judicial endorsements of not only the no-fault and government monopoly aspects of universal accident compensation but also of the funding source financial options, provincial policy-makers can rest assured that provincial constitutional competence to enact a universal first-party no-fault accident compensation scheme is today beyond dispute.

3. Federal Jurisdiction Re Increased Product Safety Regulation

A. Summary of the Constitutional Implications

criminal law-based product safety legislation such as the Hazardous Products Act or the Motor Vehicle Safety Act is quite solid. The only doubt here relates to the enforcement question, but the so-called Hauser problem should be resolved in the next year or so allowing federal concurrency. The constitutional foundation for a wider-ranging administrative enforcement structure such as a federal Consumer Product Safety Commission with various administrative powers is, however, quite shaky. Recent developments have all but killed the "general" trade and commerce jurisdiction. The resuscitation of this federal power will prove to be a formidable constitutional challenge for federal policy-makers.

B. Detailed Analysis

One of the most important research initiatives proposed in the Products Liability Study related to the feasibility of increasing the nature and extent of federal and provincial (but mainly federal) product safety regulation. The need for more responsive federal-level product safety regulation was discussed in some detail in Volume I but the general structure and design of such a regulatory initiative was not pursued. Nor do I intend here to fill in these details. Whether or to what extent a criminal law-based federal product safety regime should give way to a more comprehensive regulatory structure with wider-ranging civil and administrative remedies will have to await the findings of future researchers. My concern here is limited to a brief canvass of the constitutional questions that will have to be resolved if indeed a greater federal regulatory role is to be encouraged. I will first consider the constitutional implications of retaining and expanding the criminal law-based jurisdiction. I will then examine the more controversial constitutional dimensions of a federal product safety regime that employs

a more administrative enforcement structure.

Federal jurisdiction under section 91(27) of the British North America Act over "The Criminal Law" has traditionally been understood to mean "criminal law in the widest sense"[24] and in recent years has proven to be a judicially encouraged constitutional reservoir for all sorts of federal criminal legislation dealing broadly with "public peace, order, security, health . . . and morality", to use the oft-quoted guidelines of Mr. Justice Rand in the Margarine Reference.[25] The federal criminal law jurisdiction has been used to design and defend legislative initiatives in the area of combines investigation,[26] misleading advertising,[27] consumer packaging and labelling,[28] motor vehicle safety and hazardous products.[29] Today there is ample support for Chief Justice Laskin's assertion that "resort to the criminal law power to proscribe undesirable commercial practices is today as characteristic of its exercise as has been resort thereto to curb violence or immoral conduct."[30] Product safety regulation would fall easily within both the traditional parameters of public health and safety and the more modern concerns about undesirable commercial practices. As Professor Peter Hogg has observed: "It is well established that food and drug legislation making illegal the manufacture or sale of dangerous products, adulterated products or misbranded products is within the criminal law power."[31] The federal Hazardous Products Act is already a well recognized and judicially approved basis for criminal law-related federal product safety regulation. An increased federal role in both the nature and extent of 91(27)-based product safety scrutiny would not encounter any constitutional problems, and this notwithstanding the confusion that has recently been unleashed by the decisions of the Supreme

Court of Canada in Dominion Stores[32] and Labatt's.[33]

The decision of the Supreme Court of Canada in Labatt's in particular has caused considerable consternation. By striking down certain food and drug regulations relating to the compositional standards of "light beer" the Court has thrown consumer protection policy making into a state of some confusion. Was the Court serious in suggesting that absent fraud, safety or health-related rationales, federal food quality or compositional standard setting would not be sustained? Has the Court effectively wiped out a good chunk of federal-level consumer protection? Not to mention a good chunk of the federal trade and commerce jurisdiction? What are the implications of Labatt's for product quality regulation at the federal level in the future? What did Labatt's really decide? Unfortunately, these issues have not yet been resolved. The Labatt's decision has been extensively and I think deservedly criticized in the literature.[34] It is unprincipled, uninformed and undeniedly wrong. Fortunately, for our purposes here, it is also quite unimportant.

Even if a clear ratio could be discerned from the reasons for judgment in Labatt's, it would be at most a denial of federal legislative competence in areas of product quality regulation that lack a public health, public safety or public morals rationale. Where however, there exists a more traditional criminal law rational such as public health or safety, then federal jurisdiction remains intact. This important distinction was explicitly acknowledged by Estey J. writing for the majority in both Dominion Stores[35] and Labatt's.[36] Whatever may be the constitutional fallout of Labatt's (and it is hoped that the confusion will be resolved by the Supreme Court of Canada at the first appropriate opportunity) the implications of Labatt's do not touch the matters before us here. Even after Labatt's, one can still say with confidence that federal-level product

safety regulation based on the criminal law power remains clearly constitutional.

The only cloud on the horizon, and it is still only a cloud, relates to the question of enforcement. Although federal jurisdiction to enact criminal legislation is beyond dispute, the recent decision in Regina v. Hauser[37] has raised the very real possibility that federal jurisdiction to enforce its criminal legislation may disappear. The immediate question in Hauser was the constitutional status of federal prosecutors to prosecute violations of the Narcotic Control Act.[38] The argument was made that prosecution and enforcement of federal "criminal" laws was a matter that more properly came within section 92(14), "The Administration of Justice in the Province", a matter exclusively within provincial jurisdiction. Although accepted by a strong dissent in the Supreme Court of Canada, the majority decision managed to avoid this entire issue by deciding quite unsatisfactorily that the Narcotics Control Act was really quite "non-criminal" legislation having been enacted pursuant to the federal "Peace, Order and Good Government" power and not the federal criminal law power.[39] The question of federal status to enforce its 91(27)-based laws was thus defined away and still remains unanswered. Until the Supreme Court of Canada resolves this matter once and for all, federal prosecutorial status in such areas as hazardous products or motor vehicle safety will remain vulnerable to constitutional challenge.[40]

At the first opportunity, the Court will have to acknowledge that enforcement of federal criminal laws must remain an area for federal and provincial concurrency. This was the solution proposed by Spence J. in Hauser;[41] it has been approved and applied in at least one lower court decision already;[42] and it has been advanced by leading constitutional commentators as the most sensible resolution of the question.[43] Should

the Court decide otherwise, however, and opt for exclusive provincial jurisdiction re enforcement of federal criminal laws, then the overall feasibility of furthering 91(27)-based product safety initiatives will have to be reexamined.

Federal-level product safety regulation even with provincial-level prosecution and enforcement will not necessarily be crippled but it will certainly prove more cumbersome. Hopefully the Court will resolve the matter sensibly as described above. Should this eventuate, the federal product safety jurisdiction can be expanded, but always of course within the limitations of section 91(27) and its specific statutory design and enforcement implications.

These criminal-law limitations -- regulation and enforcement via criminal prosecution only -- may well persuade policy-makers that a more administrative enforcement procedure is necessary. The federal criminal law jurisdiction, for example, would not sustain federal legislation that provided for product quality pre-clearance procedures,(44) or administrative cease and desist powers or product recall authority,(45) or arguably even civil redress remedies such as damage awards.(46) The general trend in the jurisprudence in this area is to require that a non-criminal remedy such as, for example, prohibition orders(47) be tied quite directly to criminal prosecution and criminal sentencing.(48) Thus, if a more broadly based administrative enforcement structure is deemed worthwhile, the constitutional basis will have to be found elsewhere. This brings us to our second basic concern: the extent to which a federal-level administrative enforcement structure (such as a federal Consumer Product Safety Commission) could be constitutionally supported

The proposal on this point in the Products Liability Study was quite limited. All that was suggested was that further research be done exploring generally the need for a federal product safety regulatory scheme that went beyond criminal prosecution and included wider-ranging administrative powers such as pre-clearance, cease and desist, administrative recalls, substituted actions and civil remedies. The only point that needs to be made here will by now be obvious to most policy-makers -- the constitutional foundations for such a federal administrative agency-type structure are very shaky. The only relevant federal power would be section 91(2) "The Regulation of Trade and Commerce", a jurisdiction that has been seriously attenuated over the years, and in some respects, thanks to two very recent developments, has been virtually extinguished.

The federal trade and commerce jurisdiction has never really been a broadly based federal power. As early as 1881 the Judicial Committee of the Privy Council made it clear that section 91(2) could only be used by Parliament in two rather limited situations: " . . . regulation of trade in matters of interprovincial concern, and . . . general regulation of trade affecting the whole Dominion."(49)

The first branch of this oft-quoted obiter from Citizens Insurance Company v. Parsons(50) allows a federal role in the regulation of interprovincial trade. Where there is an interprovincial flow of goods, then federal regulation is permissible and recourse to administrative or civil remedies is constitutionally proper.(51) But the first branch of Parsons requires that the federal regulation focus primarily on interprovincial trade. This focus would of course be much too narrow for any meaningful federal-level product safety regulation. A great many products (probably most of the products) that we use and that may prove defective and/or

injurious are manufactured, distributed, purchased and consumed within the confines of one province. A workable and effective federal product safety regime would have to have the institutional capacity to regulate not only products in the flow of interprovincial trade but also the vast majority of products that are manufactured and consumed intraprovincially. The first branch of the trade and commerce power, although powerful in its own right, would not provide the necessary or sufficient constitutional basis for effective federal-level product safety regulation.

One has to depend mainly on the constitutional leverage provided by the so-called "second" branch of Parsons: "general regulation of trade affecting the whole Dominion".(52) On occasion and most recently in the 1976 decision in Vapour Canada,(53) some members of the Supreme Court of Canada have indicated a willingness to take seriously this general trade and commerce power and allow a federal role in the regulation of trade affecting the whole Dominion, provided only that there be some "regulatory scheme" that was being administered by a "federally-appointed agency".(54) But such reference has been at best occasional and uncertain. In fact, the "general" trade and commerce power has only been used in two cases -- one dealing with the incorporation of federal companies(55) and the other with the federal trademarks jurisdiction.(56) More often than not, the "general" trade and commerce power has been judicially rejected(57) or ignored.(58) At its best, the second branch of Parsons has had a very tenuous constitutional existence. And today, given two recent developments, the "general" trade and commerce power may well be dead.

The decisions of the Supreme Court of Canada in Dominion Stores and in particular in Labatt's, if taken literally, have arguably rendered the "general" trade and commerce power pretty much a dead letter. Why this

interpretation of Labatt's is indeed a plausible one has been explained at length in the secondary literature.(59) The reader is referred to these analyses for careful constitutional dissection of the Labatt's trade and commerce implications. It will suffice for our purposes here to note that unless the Supreme Court of Canada takes the initiative in future case law to lift the dead hand of Labatt's from the second branch of Parsons, the short term prospects for a "general" trade and commerce jurisdiction resilient enough to support a federal product safety administrative enforcement regime seem very bleak indeed. The Court may surprise its critics and may decide with some jurisprudential prodding that the time has come to re-activate a sensibly broad federal-level general trade and commerce power. Labatt's could easily be distinguished on its facts and then relegated to per incuriam status. It could be done. I think it should be done. But whether or not the next decade or so will witness the resuscitation of a more principled federal trade and commerce jurisdiction remains to be seen.

All that federal and provincial policy-makers can do at this stage is continue on with the relevant product safety research and propose whatever institutional reforms are deemed appropriate and necessary. If the regulatory reforms can be linked to the traditionally protected federal criminal law power, than the constitutional implications will be insignificant and probably non-existent. If, on the other hand, the research takes policy-makers in the direction of a federal product safety agency with wide-ranging administrative enforcement powers, then the constitutional implications become quite substantial. The re-establishment of a federal "general" trade and commerce power is not wholly unrealistic, but it will involve a considerable amount of constitutional litigation and sophisticated argumentation.(60)

II. THE CONSTITUTIONAL IMPLICATIONS OF THE CONSUMER PRODUCT WARRANTY REFORM PROPOSALS

This part examines the constitutional implications of the reforms that were proposed in the Consumer Product Warranty Study.(61) The specific reforms proposed were these:

> "1. Enact omnibus consumer product warranty legislation but do so with more care and sophistication.
>
> 2. Deal with manufacturers' written or express warranties via a carefully designed information disclosure requirement.
>
> 3. Provide consumers with stronger and more meaningful remedies.
>
> 4. Develop more innovative and more responsive dispute resolution mechanisms but do so on an experimental problem-specific basis.
>
> 5. Encourage consumer product industry groups to standardize voluntarily their consumer product warranty documents.
>
> 6. Consider government standard form of warranty regulation but only where demonstrably necessary.
>
> 7. Examine and assess the structure and operation of modern consumer product warranty systems.
>
> 8. Consider seriously the proposals for "unbundling" consumer product warranties.
>
> 9. Make a greater commitment to long-term consumer education via plain language legislation and high school law teaching.
>
> 10. Work towards greater interprovincial uniformity in consumer product warranty regulation.
>
> 11. Various assorted proposals re further research."(62)

All of the reforms proposed above fall easily, with only one or two minor constitutional wrinkles, within provincial legislative competence. None of

the suggested reforms pose any real constitutional problems. Still, in order to provide provincial policy-makers with a more precise constitutional analysis, I have assessed individually each of the reforms proposed in the order in which they appear in the original study. I have also employed the same format as in Part I above -- first, a summary statement of the constitutional implications and then a more detailed analysis.

1. Provincial Jurisdiction to Enact Omnibus Consumer Product Warranty Legislation

A. Summary of the Constitutional Implications

Omnibus CPW statutes such as those recently enacted in Saskatchewan and New Brunswick[63] are constitutionally within provincial legislative competence. The constitutional basis is contract law, regulation of provincial trade, and consumer protection, all of which are matters that fall easily within provincial jurisdiction over "property and civil rights".

B. Detailed Analysis

Just as the provincial "property and civil rights" jurisdiction provides an ample basis for the accident compensation proposals discussed above in Part I, similarly section 92(13) provides a broad basis of constitutional support for provincially initiated consumer product warranty reforms. The phrase "property and civil rights" after all, has long been understood to be "a compendious description of the entire body of private law which governs the relationships between subject and subject."[64] Provincial jurisdiction over "civil rights" in particular has traditionally sustained provincial legislative initiatives in the fields of contract law and consumer protection.

As Professor Peter Hogg correctly observed: "Contracts of sale and purchase are prima facie matters within 'property and civil rights in the province' and therefore amenable to provincial legislation."(65)

The jurisprudential foundation for this conclusion is solid and long-standing. The case law is chock full of precedents supporting provincial legislative competence in the regulation of contracts and consumer protection.(66) If any specific authority is required none could be clearer than the 1963 decision of the Supreme Court of Canada in Barfried Enterprises(67) which unequivocally endorsed provincial contracts and consumer protection initiatives in the area of consumer money-lending transactions as falling within the "civil rights" jurisdiction of section 92(13).(68) Other more recent decisions have also supported provincial consumer protection initiatives in the regulation of product sales as valid exercises of provincial power.(69) In a very recent Supreme Court of Canada decision, Estey J. writing for the majority, remarked that "if contractual rights within the province are the object of the proposed regulation, the province has the authority."(70) This judicial statement is an apt summary of the jurisprudence to date and remains today beyond dispute.

In addition to this contracts and consumer protection jurisdiction, "there is no doubt that under section 92(13) the provinces have the power to regulate intra-provincial trade".(71) This latter jurisdiction is of course traceable to Citizens Insurance Company v. Parsons,(72) the landmark decision discussed earlier where the Judicial Committee of the Privy Council made it clear that "the contracts of a particular business or trade" fall within the exclusive jurisdiction of the provincial legislators.(73) This "well-settled"(74) jurisdiction to regulate businesses or trades in the province has allowed and has sustained provincial legislative initiatives in the area of trade practices.

Both the British Columbia Trade Practices Act[75] and the Ontario Business Practices Act[76] have been judicially considered in several lower court decisions and have withstood constitutional challenge. In Stubbe v. P.F. Collier and Son Ltd.[77] the Court concluded that the B.C. Trade Practices Act was valid provincial legislation:

> "In pith and substance the matter to which the (Trade Practices Act) relates is deceptive or unconscionable acts or practices in consumer transactions within the province. I may properly put this a little differently: the Act relates to the regulation of 'business ethics' in the province in the field of defined consumer transactions."/(78)

In Aamco Automatic Transmission Inc. and Simpson[79] the court concluded that the Ontario Business Practices Act was also intra vires. Here is what was said:

> " . . . We are of the opinion that there is no reason to doubt that the main object sought to be secured in this Act is to secure that persons who carry on business dealings in Ontario shall be honest and of good repute, and in this way to protect the public from being defrauded . . . . The province having the power to regulate business practices, it cannot be said that it has no power to prohibit those business practices which it deems to be unfair, and once having the power to prohibit these specific unfair business practices, it has the power ancillary to it under the provisions of section 92(15) of the British North America Act, 1967 to impose a punishment by fine to enforce such a law without thereby infringing upon the criminal law."/(80)

In sum, the provincial "civil rights" jurisdiction is wide-ranging enough to sustain not only provincial contracts and sales law initiatives, but also the regulation of local businesses and trades and trade practices, and consumer protection generally. This three-pronged jurisdictional base is more than sufficient to sustain an omnibus consumer product warranty statute

such as those that have recently been enacted in Saskatchewan and New Brunswick. The regulation of consumer product warranties falls easily within each of the three fields mentioned: contract law, trade practices legislation and consumer protection. The enactment of such provincial legislation would not present any constitutional difficulty.

2. Provincial Jurisdiction to Deal with Manufacturers' Warranties Via Information Disclosure Regulation

A. Summary of the Constitutional Implications

A provincially enacted consumer product warranty statute requiring the disclosure of certain information on the part of the product supplier would fall within the provincial contracts and consumer protection jurisdiction discussed above. Provincial information disclosure regulation has been upheld in the securities and consumer credit areas and would also be upheld in the consumer product warranty field. Legislatively required information disclosure affects both the form and the content of certain contractual (consumer product warranty) documents and is thus a proper matter for provincial regulation.

B. Detailed Analysis

Provincial legislation requiring the disclosure of certain contractually-relevant informational items is part and parcel of the traditional jurisdiction to regulate contracts and to enact consumer protection laws. The general basis for this jurisdiction has been described in Part II.1 above.

Dealing specifically with information disclosure regulation, Canadian courts have upheld various provincial initiatives in both the securities field and the consumer credit area.(81) On the latter point especially the decision of the Supreme Court of Canada in Barfried Enterprises(82) ranks as the clearest signal in the case law to date that provincial jurisdiction to regulate information disclosure in areas of consumer protection concern is judicially acknowledged and approved. It would, quite frankly, be difficult to imagine a situation where provincial information disclosure regulation re intra-provincial product sales transactions would be struck down as unconstitutional. Certainly in the area that concerns us here -- disclosure regulation relating to consumer product warranties -- there is every reason to believe that these provincial legislative initiatives would easily clear the constitutional hurdle.

3. Provincial Jurisdiction to Legislate "Stronger and More Meaningful" Consumer Remedies

A. Summary of the Constitutional Implications

Provincial jurisdiction to enact contractual or consumer protection reforms providing consumers with stronger and more meaningful consumer remedies in cases of contractual breach or unsatisfactory product supplier repair performance is beyond dispute. The basis for this jurisdiction has already been described in Part II.1 above. Provincial legislative initiatives providing, for example, wider contractual rescission rights in certain specified circumstances would not present any constitutional difficulty.

B. Detailed Analysis

The "stronger and more meaningful" consumer remedy reforms proposed in the Consumer Product Warranty Study focused on the possibility of expanding the consumer's rights to rescind a consumer product transaction if supplier performance has proven unsatisfactory. Wider consumer product warranty rescissionary rights would of course be statutorily provided and thus would join the growing list of consumer protection enactments dealing with consumer trade practices and product quality, all of which have been or will be judicially upheld as valid exercises of provincial jurisdiction over "property and civil rights in the province".(83) If contracts, trade practices and consumer protection generally are matters that fall within the constitutional mainstream of the provincial 92(13) jurisdiction, then the remedies provided to contracting parties pursuant to these legislative initiatives must also fall within provincial legislative competence.(84)

4. Provincial Jurisdiction to Develop More Innovative and More Responsive Dispute Resolution Mechanisms

A. Summary of the Constitutional Implications

The constitutional basis for provincial legislative experimentation with more innovative and responsive consumer product warranty dispute resolution mechanisms is somewhat more problematic and depends to a great extent upon the particular design of the dispute resolution mechanism being proposed. Informal, voluntarily-organized and operated product supplier mediation panels present no constitutional difficulties. Nor do small claims

court reforms. But the design and implementation of new dispute resolution structures with wide-ranging arbitral or consumer remedy powers may present provincial policy-makers with a more substantial constitutional hurdle. Whether or to what extent this hurdle can be cleared will depend on the scope and institutional design of the non-curial consumer dispute resolution mechanism that is proposed.

B. Detailed Analysis

Of all of the proposals for reform suggested in the Consumer Product Warranty Study, this one is the only one that poses any serious constitutional problems. Fortunately these constitutional complications are limited to one very particular area of legislative action.

The proposals, for example, that call for greater voluntary involvement of industry in sponsoring informal business-specific mediation panels such as the Major Appliance Consumer Action Panel described in Volume II,[85] or the Better Business Bureau, would not in all likelihood require any legislative action. And even if some legislative sanction was deemed desirable, provided that the suggested dispute resolution mechanisms were mediational more than adjudicational and provided that these informal structures did not prevent party access to the courts for final resolution of a particular dispute, these provincial initiatives would not run afoul of any constitutional constraints. The regulation of intraprovincial trade is very much a part of the provincial "property and civil rights" jurisdiction that was described in Part II.1 above.

Similarly, no constitutional difficulties would be encountered if among the proposed experiments in more innovative consumer dispute resolution was found a proposal or a series of proposals to reform and render more

accessible and effective the small claims court system. Here again, provided that the basic features of small claims adjudication were retained, any number of modernizing modifications (such as small claims court "duty counsel", pre-trial mediation efforts, or non-binding third party arbitration techniques, etc.) could be effected within the traditional constitutional parameters of provincial legislative action. Both the case law and the scholarly literature is clear that such conventional, non-fundamental reforms of the small claims court process would be constitutionally permissible.(86)

The only constitutional issue that has surfaced in this area of dispute resolution experimentation involves a situation where existing structures are altered so fundamentally, or new structures for the resolution of disputes are designed and established with such wide-ranging non-curial but still traditionally judicial powers, that a court would conclude that section 96 of the British North America Act had been violated.

Section 96 on its face is nothing more than a federal judicial appointing power: "The Governor-General shall appoint the Judges of the Superior District and County Courts in each Province . . . ."(87) In order to guarantee the continued viability of the section 96 appointing power, judicial decisions have interpreted the scope and content of the provision, as well as its institutional implications, quite restrictively. Professor Peter Hogg explains:

> "If sections 96 to 100 of the BNA Act were read literally, they could easily be evaded by a province which wanted to assume control of its judicial appointments. The province could increase the jurisdiction of its inferior courts so that they assumed much of the jurisdiction of the higher courts; or the province could vest higher-court jurisdiction

> in a newly-established tribunal, and call that tribunal an inferior court or an administrative tribunal. It is therefore not surprising that the courts have added a gloss to section 96 and the associated constitutional provisions. What they have said is this: if a province invests a tribunal with a jurisdiction of a kind which ought properly to belong to a superior, district or county court, than that tribunal, whatever its official name, is for constitutional purposes a superior, district or county court and must satisfy the requirements of section 96 and the associate provisions of the BNA Act. This means that such a tribunal would be invalidly constituted, unless its members (1) are appointed by the federal government in conformity with section 96, (2) are drawn from the Bar of the province in conformity with sections 97 and 98, and (3) receive salaries which are fixed and provided by the federal Parliament in conformity with section 100."/(88)

The difficulty, of course, lies in predicting what functions of provincially-appointed administrative tribunals belong more properly to superior, district or county courts, and at what precise point a provincially-established administrative body and its statutorily-provided adjudicative or remedial powers will be deemed to violate the dictates of section 96.

The so-called "section 96 problem" has produced an extensive secondary literature prompted in part by recent judicial activity on this very question.(89) It is not my intention here to canvass either the literature or the case law in any detail. The instant reform proposal does not specifically suggest that policy-makers move to establish new and intricate non-judicial consumer dispute resolution structures. What the proposal does suggest is that provincial policy-makers "develop more innovative and more responsive dispute resolution mechanisms" but that they do so "on an experimental problem-specific basis". This latter qualification is particularly important to ensure not only

that modest experimentation be the touch stone, but also to ensure that if or when a more radical dispute resolution mechanism is deemed desirable, the proper empirical and analytical foundations would have been laid to respond to the "section 96" issue. Until provincial legislators have determined both the need for and the specific design of the dispute resolution mechanism that is thought to be most appropriate in the circumstances, further discussion of the section 96 problem should be postponed.

Suffice it to say at this point that provincial policy-makers need not be discouraged by the potential height of the section 96 constitutional hurdle. It has been cleared in recent years by several provincial initiatives, including labour relations boards,(90) commercial registration appeal tribunals,(91) and in some cases residential tenancies commissions.(92) As Professor Peter Hogg has observed:

> "[Canadian] courts have exercised restraint in reviewing the provincial statutes which create new adjudicatory jurisdictions, so that the difficulty has not been as serious as it could have been . . . it seems unlikely that section 96 difficulties have seriously hampered the development of administrative tribunals in the provinces."/(93)

Still, the constitutional pitfall is there for the unwary provincial policy-maker. When more specific proposals are forthcoming with respect to alternative dispute resolution mechanisms, the section 96 problem will have to be specifically confronted and resolved.(94)

5. Provincial Jurisdiction to Encourage Consumer Product Industry Groups to Standardize Voluntarily Their Consumer Product Warranty Documents

[There are no constitutional implications in this proposal. Provincial encouragement of product-supplier cooperation on a voluntary basis does not require legislative sanction and thus does not present any constitutional difficulty.]

6. Provincial Jurisdiction to Enact Standard Form of Warranty Legislation

A. Summary of the Constitutional Implications

Provincial jurisdiction to enact standard form of warranty legislation rests on three specific categories of the wide-ranging "property and civil rights" power: contractual transactions in the province, regulation of intra-provincial trade, and consumer protection. Any of these would provide ample constitutional support for standard form of warranty legislation.

B. Detailed Analysis

The three bases of provincial jurisdiction described in Part II.1 above would apply with equal force here. Provincial legislation regulating and defining the form of consumer product warranty documents that can be used in the province falls easily within the provincial contracts jurisdiction, the jurisdiction to regulate intraprovincial trade and jurisdiction over consumer protection generally, each of these aspects of the provincial "property and civil rights" jurisdiction was discussed in some detail in Part II.1 above. The points need not be repeated here. Like omnibus consumer products warranty legislation, provincial standard form of warranty regulation, provided it is directed at consumer product warranty documents that are being used in the province would present no constitutional difficulty.

7. Provincial Jurisdiction to Examine and Assess the Structure and Operation of Modern Consumer Product Warranty Systems

8. Provincial Jurisdiction to Consider Seriously the Proposals For "Unbundling" Consumer Product Warranties

[There are no constitutional implications in either of these proposals. The first is completely research-oriented and the second merely recommends further study of a matter that depends more on the repeal of existing law than it does on the enactment of new law.]

9. Provincial Jurisdiction Re Long-Term Consumer Education: Plain Language Legislation and High School Law Teaching

A. Summary of the Constitutional Implications

The proposal encouraging a greater provincial initiative in the consolidation, codification, or at minimum the re-drafting of current consumer protection legislation for greater understandability presents no constitutional difficulty. The proposal calling for a provincial-level "plain English" law also has few if any constitutional pitfalls. The relevant jurisprudence has already been described in Part II.1 above. Finally, the proposals for a more serious commitment to high school law teaching fall easily within the traditional provincial jurisdiction over education.

B. Detailed Analysis

This proposal considers three possible areas of provincial action in developing over the long-term a more effective consumer education programme. The first had to do with provincial initiatives to re-draft current consumer protection statutes and especially any proposed consumer product warranty statutes in plainer, and easier to understand legislative language. There is nothing in this proposal, of course, that presents any difficulty constitutionally. The second possibility proposed was provincial enactment of a "plain English" law that would require that all consumer contracts in

use in the province be drafted in readable and understandable English. The thrust of this proposal would involve provincial regulation of the language and possibly the form of consumer contracts in use in the province and thus would clearly come within one or all of the three constitutional bases referred to in Parts II.1, II.2 and II.6 above.

The third proposal canvassed under the general rubric of long-term consumer education strategies dealt with the establishment and improvement of high school law teaching. If accepted, this would involve Ministry of Education initiatives in high school curriculum planning and, constitutionally, would fall within section 93 of the British North America Act and the province's traditional jurisdiction over education.

10. Provincial Jurisdiction to Work Towards Greater Interprovincial Uniformity in Consumer Product Warranty Regulation

11. Provincial Jurisdiction Re Various Proposals for Further Research

[For reasons that are self-evident, neither of these proposals raises any constitutional question. Neither requires any specific legislative action (at least not at this time) and thus no constitutional difficulties are presented].

III. CONCLUSIONS

As promised, this study of the constitutional implications of the reforms proposed in both the Products Liability and the Consumer Product Warranty Studies has been brief and to the point. But I am also confident

that it has been accurate. Few if any of the reforms proposed present policy-makers with a constitutional concern. Virtually all of the five reforms proposed in Volume I, short of a federal-level product safety administrative agency structure, can be implemented within the constitutional constraints that confine provincial and federal legislators today. The eleven reforms proposed in Volume II can be implemented at the provincial level today with full confidence that the constitutional concerns, to the extent that one can find any, are quite minimal. In each of the areas studied, federal and provincial policy-makers should rest assured that the reforms proposed are constitutionally feasible.

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FOOTNOTES

1. Belobaba (1980). For a more complete citation see Selected Bibliography.

2. Belobaba (1980).

3. Belobaba (1980) at 181.

4. Discussed in Belobaba (1980) at 3-5.

5. The British North America Act 1867, 30-31 Vict., c.3 (Imp.), referred to hereinafter as the B.N.A. Act.

6. B.N.A. Act, s.92(13).

7. See Hogg (1977) at 295-320.

8. Described in Belobaba (1980) at 47-54.

9. [1920] A.C. 184 (J.C.P.C.)

10. Id., at 190-91.

11. The Sincennes McNaughton Lines v. Bruneau [1924] S.C.R. 168 per Duff J. (as he then was) at 173. Also see at 169, 172, 177 and 178.

12. (1966) 59 D.L.R. (2d) 145 (S.C.C.).

13. Id., at 150.

14. Id., at 150.

15. (1976) 73 D.L.R. (3d) 111 (S.C.C.).

16. Id., at 114.

17. Id., at 117.

18. Workmen's Compensation Bd. v. C.P.R., supra note 9, at 190-91.

19. B.N.A. Act, section 92(2).

20. Supra, note 9.

21. Id.

22. Id., at 190.

23. Royal Bank v. Workmen's Compensation Bd. of Nova Scotia [1936] S.C.R. 560.

24. A.G. Ontario v. Hamilton Street Pkwy [1903] A.C. 524. Also see Arvay (1979), Henderson (1978), Hogg (1977) at 277-293, and Kerr (1980) passim.

25. [1949] S.C.R. 1 (S.C.C.) at 50.

26. Proprietory Articles Trade Assoc. v. A.G. Canada [1931] A.C. 310.

27. Caselaw discussed in Henderson (1978).

28. R. v. Steinberg's Ltd. (1977) 80 D.L.R. (3d) 741. (Ont.)

29. R. v. Cosman's Fruniture [1977] 1 W.W.R. 81 (Man. C.A.). See Hogg (1977) at 281 and at 291.

30. Laskin, Canadian Constitutional Law (4th ed. rev. 1975) at 824. Also see Hogg (1977) at 281.

31. Hogg (1977) at 280-281.

32. R. v. Dominion Stores Ltd. and A.G. Ontario, (1979) 30 N.R. 399.

33. Labatt Breweries of Canada Ltd. v. A.G. Canada and A.G. Quebec, (1979) 30 N.R. 497.

34. See, for example, MacPherson (1981) at 64-81.

35. Supra, note 32, at 403.

36. Supra, note 33, at 511-12, 510 and 522.

37. (1979) 26 N.R. 541.

38. Narcotic Control Act, R.S.C., 1970, c.N-1.

39. In Industrial Acceptance Corp. v. The Queen [1953] 2 S.C.R. 273, the Supreme Court of Canada held that the Narcotics Control Act and its predecessor was enacted pursuant to the federal criminal law power. For a criticism of Pigeon J.'s virtual disregard of judicial precedent in this area see MacPherson (1980) at 94-95.

40. See, for example, the lower court decision in R. v. Kripps Pharmacy, (1980) 14 C.R. (3d) 355.

41. Supra, note 37, at 559.

42. R. v. Hoffman-LaRoche Ltd. (1980) 28 O.R. 2d 164 (Ont. H.Ct.) per Linden J. at 184.

43. See MacPherson, (1980) at 101-02.

44. Re Dominion Trade and Industrial Commission Act [1936] S.C.R. 379.

45. Discussed generally in Anisman and Hogg (1979), Cohen and Ziegel (1976), Grange (1975), Hatfield (1977), Hogg and Grover (1976-77), and MacDonald (1969).

46. Id., and especially Anisman and Hogg (1979), Grange (1975) and Hogg and Grover (1976-77). The constitutional validity of section 31.1 of the Combines Investigation Act (the "civil redress" provision) has been upheld in Henuset Bros. Ltd. v. Syncrude Canada, (1980) 114 D.L.R. 3d 300 but was struck down as ultra vires in Rocois Construction v. Quebec Ready Mix [1980] 1 F.C. 184 and in Seiko Time Canada Ltd. v. Consumers Distributing Co. Ltd. (1980) 29 O.R. 2d 221.

47. Goodyear Tire & Rubber Co. v. R., [1956] S.C.R. 303.

48. See generally Cohen and Ziegel (1976), Grange (1975), Hatfield (1977) Hogg (1976), and Hogg (1977) at 287-89.

49. Citizens Insurance Co. v. Parsons, (1881) 7 A.C. 96 at 113.

50. Id.

51. Supra, note 44.

52. Supra, note 49, at 113.

53. MacDonald v. Vapor Canada, (1976) 66 D.L.R. (3d) 1 (S.C.C.). For comment see Hogg (1976).

54. Id., per Laskin C.J. at 12, 19, 20, 25-26 and 27.

55. John Deere Plow Co. v. Wharton [1915] A.C. 330 at 340.

56. A.G. Ontario v. A.G. Canada [1937] A.C. 405 at 417. And see Hogg (1977) at 272-73.

57. Caselaw discussed in Hogg (1977) at 273.

58. In the important Anti-Inflation Act Reference, [1976] 2 S.C.R. 373, the federal trade and commerce power was not even seriously advanced as a basis for the federal wage and price controls. See Hogg (1977) at 274-75.

59. See the excellent analysis by MacPherson (1980) at 89-103.

60. The nature and extent of available argumentation to support the resuscitation of the federal trade and commerce power has only been alluded to in the body of this paper. A more detailed analysis is presented in several of the articles referred to supra note 45. If and when federal policy-makers decide that federal administrative enforcement of product safety regulation is necessary or desirable, I would be more than happy to develop the requisite constitutional argumentation.

61. Belobaba (1981).

62. Belobaba (1981) at 168-69.

63. Described in detail in Belobaba (1981) at 27-29.

64. Hogg (1977) at 297.

65. Id., at 310.

66. See generally Hogg (1977) at 295-303 and Romero (1975) passim.

67. A.G. Ontario v. Barfried Enterprises [1963] S.C.R. 570.

68. Id., per Judson J. at 577. Also see Bentley (1964), Pitch (1972) and Romero (1975) at 10-15.

69. See R. v. Telegram Publishing (1960) 25 D.L.R. 2d 471 (Ont. H.Ct.); Benson and Hedges v. A.G. British Columbia (1972) 27 D.L.R. 3d 257 (B.C.S.C.) and A.G. Quebec v. Kellogg's Co. (1978) 83 D.L.R. (3d) 314 (S.C.C.).

70. Labatt Breweries, supra note 33, per Estey J. at 519.

71. Hogg (1977) at 310.

72. Supra, note 49.

73. Id., at 113.

74. Shannon v. Lower Mainland Dairy Products Bd. [1938] 4 D.L.R. 81 (JCPC) at 84-85.

75. S.B.C. 1974, c.96, as am. by S.B.C. 1975 c.80.

76. S.O. 1974, c.131.

77. (1977) 74 D.L.R. 3d 605.

78. Id., at 642.

79. (1980) 29 O.R. 2d 565 (Ont. H. Ct.).

80. Id., at 573-74.

81. With regard to provincial securities information disclosure see Smith v. R. [1960] S.C.R. 776; Gregory and Co. v. Quebec Securities Commission [1961] S.C.R. 584 and Re Thadas (1970) 10 C.R.N.S. 290 (B.C.C.A.). Also see Hogg (1977) at 312-14. With regard to consumer credit disclosure recall Barfried, supra, note 67, and see caselaw discussed in Pitch (1972) and Romero (1975).

82. Barfried Enterprises, supra, note 67.

83. See discussion above in Parts II.1 and II.2.

84. Accord, Aamco Transmissions, supra, note 79 and Vapor Canada, supra, note 53.

85. See Belobaba (1981) at 143.

86. See New Brunswick Department of Justice (1976) at 352 et seq. Also see Hogg (1977) at 131-33.

87. B.N.A. Act, s.96.

88. Hogg (1977) at 130-31.

89. The secondary literature is collected in Hogg (1977) at 131, note 82. Recent judicial developments include A.G. Quebec and the Transport Tribunal v. Farrah, [1978] 2 S.C.R. 638 and City of Mississauga v. Regional Municipality of Peel, (1979) 26 N.R. 200 (S.C.C.). Discussed in MacPherson (1980) at 103-11.

90. Tomko v. Labour Relations Bd. of Nova Scotia, [1977] 1 S.C.R. 112.

91. W.G. Pollock Studio of Dancing Ltd. v. Director of the Business Practices Act, (unreported, Ont. H.Ct., Oct. 4, 1978).

92. Provincial residential tenancy commissions have been upheld in Re Pepita and Doukas (1979) 101 D.L.R. 3d 577 (B.C.C.A.) but were struck down as violations of section 96 in Reference the Constitutional Question Act (Alberta) [1978] 6 W.W.R. 152 (Alta. C.A.) and in Reference Re Residential Tenancies Act, (1980) 26 O.R. 2d 609 (Ont. C.A.). The latter decision is now on appeal to the Supreme Court of Canada.

93. Hogg (1977) at 131 and 136.

94. An excellent starting point in the synthesis and analysis of section 96 and its provincial-institutional implications can be found in MacPherson (1980) at 103-11.

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